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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOHN DOUGLAS McSWAIN, Plaintiff and Appellant, v. STATE PERSONNEL BOARD etc., et al., Defendants and Respondents.	C035099 (Super. Ct. No. 96CS02255)

John McSwain was terminated from his position as a hydroelectric power operator for the Department of Water Resources (the Department) based on an incident in which he left his duty and secreted himself in the women's restroom and various incidents of discourteous behavior. The termination was upheld by the State Personnel Board (the Board). McSwain appeals from the judgment denying his petition for a writ of mandate to overturn the Board's decision. He contends the

Department failed to conduct a fair investigation; the Board's findings were not supported by substantial evidence; the Department failed to follow the Americans with Disabilities Act; and the penalty of dismissal was excessive. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

McSwain had worked for the Department since December 1980; by 1986 he attained the position of hydroelectric plant operator at the San Luis plant. The operator operates the equipment in the plant, such as the pumps, generators, and aqueduct control facilities. Working on a schedule to ensure timely deliveries of water and generation, the operator coordinates with the project operations center in Sacramento. He also coordinates his work with that of plant mechanics, electricians, and technicians. The operator is responsible for switching in both high voltage areas and low voltage areas. He periodically patrols the plant looking for abnormal conditions and corrects such conditions or initiates corrective action. The operator is responsible for answering alarms, taking unit readings, and starting and stopping the units. The position is designated a sensitive position; the operator must be available at all times and has a higher degree of responsibility to respond to emergencies.

The San Luis plant has seven floors. The ground level is the fifth floor and the control room is on the fourth floor. The women's restroom is on the fifth floor; outside the restroom is a lobby with a telephone next to the main entrance. Each shift is staffed with an operator and a senior operator.

On December 3-4, 1992, McSwain was working the night shift, until 7 a.m., with senior operator Kenneth Allen. McSwain left the control room from 1 a.m. until 4 a.m. and again shortly after 5 a.m. He did not tell Allen where he was going. At 6:45 a.m., Thomas Giraldin arrived to relieve Allen; Tamara Compton was already there to relieve McSwain. McSwain could not be found.

While they were looking for McSwain, alarm bells went off; the alarms were due to maintenance. When McSwain did not respond, John Lawrence, the chief operator, asked Giraldin to ring the signal bell for McSwain. The signal bell rang twice. There was still no response from McSwain, so Giraldin asked Edna Sparks, a control technician, to check the women's restroom. Sparks entered the restroom and McSwain rose from a couch. He said, "Guess you caught me," and mentioned he forgot to set his wrist alarm. McSwain looked groggy. Lawrence and James Blood, the plant superintendent, accompanied McSwain into an office to discuss the matter. McSwain said he was tired as he had been working long hours. He did not mention any medication he was taking.

The daily log for that day showed that McSwain had not recorded transformer temperatures or inspected the switchyard.

Several months earlier, Garry Scoles, a senior operator, witnessed two incidents involving McSwain. In the pants-dropping incident, Scoles was in the control room while McSwain was at a cleaning station. Scoles heard a tap on the large window and turned to see McSwain waving. Scoles waved and when

he looked again he saw McSwain “had his genitals pressed against the window” in the form of a joke. McSwain laughed. McSwain later told Lawrence about the incident.

Another time Scoles teased McSwain about his negative attitude, saying he had not had any lately. In response, McSwain mooned Scoles and another employee. Scoles told McSwain it was the “scariest” thing he ever saw.

A few days after the restroom incident, McSwain called to say he would be late for work. When he arrived, he had a bloody toenail and asked to go to the hospital to have it taken care of. McSwain got a doctor’s note that he would be off work for one week. Someone called Lawrence and told him McSwain had reported as a volunteer firefighter while off work. Lawrence confirmed this with the fire chief, called McSwain’s doctor, and McSwain was released to return to work. Lawrence told McSwain to give him everything about the toenail; in addition to his excuse and doctor’s certificate, McSwain sent him the bloody toenail wrapped in gauze.

On several occasions, McSwain made sexually explicit remarks about Blood’s wife, who also worked at the Department. He told Scoles several times he had “fucked” her before she married Blood. He told Allen that “when he sucked on her breasts she creamed her jeans and how she soaked the front of her pants, [and] she liked to do it doggy-style.” Allen also overheard a phone conversation in which McSwain said he had had sex with Blood’s wife and would be willing to meet her in a motel to do it again. After he was served with the notice of

adverse action, McSwain told Compton it was personal between him and Blood because he "was fucking" Blood's wife before Blood dated her.

In January 1993, McSwain was served with a notice of adverse action, informing him he was dismissed from his position effective January 29, 1993, for inexcusable neglect of duty and willful disobedience (Gov. Code, § 19572, subds. (d) and (o)), based on his sleeping in the women's restroom.

McSwain's union sent the Department a letter pointing out a recent precedential decision by the Board that found sleeping on duty insufficient to justify termination where there was no documented progressive discipline.

The Department sent an amended notice of adverse action. The action was based on inexcusable neglect of duty, insubordination, dishonesty, inexcusable absence without leave, discourteous treatment, willful disobedience, failure of good behavior, and unlawful retaliation (Gov. Code, § 19572, subds. (d), (e), (f), (j), (m), (o), (t), (x)). The dismissal was based on several acts, including the pants-dropping incident, the mooning incident, the bloody toenail incident, and the crude and vulgar remarks about a co-worker, Blood's wife.[1]

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[1] The notice listed additional acts that were dropped (fishing without a license), found not to be grounds for discipline (reporting as a firefighter while on medical leave and keeping a sleeping bag in his locker), or found not to be proven (making threatening phone calls to Blood).

At a hearing before an administrative law judge (ALJ), there was considerable testimony that it was not unusual for an operator to fall asleep on the job. McSwain testified on the morning of the restroom incident he went to take readings. On the fifth floor he got dizzy and sat down in the lobby. He was still dizzy, so he went to the couch in the women's restroom to lie down. He alternated between lying down and sitting up. He was on medication for chronic hypertension; management knew about that as he had had an attack at work and had to go to the hospital.

McSwain's physician, John Mevi, testified McSwain had hypertension and labryinthitis. In 1993, McSwain was diagnosed with Meniere's syndrome, which is characterized by dizziness and ringing in the ears. McSwain had not requested a letter for his employer or any accommodation in 1992.

There was also testimony about McSwain's drinking problem. In the spring or summer of 1992, Lawrence and Blood went to the administrative officer as they thought McSwain might have a drinking problem. They tried unsuccessfully to get McSwain to self-refer to an employee assistance program. McSwain saw no need. After the restroom incident, McSwain went to an employee assistance program and to alcohol and drug abuse counseling. He learned that binge drinking could be an alcohol abuse problem.

On the issue of the appropriate discipline, Lonnie Long, the chief of the southern field division, testified the consensus of the field division chiefs was that sleeping on the

job was a serious matter and termination an appropriate action. The operator was required to take prompt action to correct abnormal conditions before life or equipment was threatened. On cross-examination by McSwain's attorney, Lawrence testified Scoles had been absent from the plant without prior approval. The first three incidents resulted in a verbal reprimand; the fourth time Scoles received a written reprimand. The initial draft of the notice of adverse action against McSwain called for a one-year reduction in pay of five percent.

The ALJ found no evidence that McSwain was sleeping, but that he did leave his post, failed to complete work, and failed to respond to alarms. The ALJ found McSwain engaged in discourteous treatment and other failure of good behavior in the pants dropping and mooning incidents, sending the bloody toenail, and his lewd remarks about Blood's wife. McSwain inexcusably neglected his duty in the restroom incident. The ALJ found McSwain's bizarre misbehavior could be due to his alcoholism and modified the dismissal to a suspension with reinstatement conditioned upon ongoing participation in a rehabilitation program.

The Board rejected the ALJ's decision and determined to decide the case itself. The Board requested briefing on what evidence established the misconduct was attributable to alcoholism and what the appropriate penalty should be.

The Board found cause for discipline based on inexcusable neglect of duty in the restroom incident and inappropriate behavior and discourteous treatment in the mooning and pants

dropping incidents, the bloody toenail incident, and the sexual remarks. It rejected the alcoholism defense, finding no evidence McSwain's misconduct was attributable to alcoholism. The Board found dismissal was appropriate. It concluded that secreting himself in the women's restroom and failing to respond to the alarm was serious misconduct and when coupled with his repetitive juvenile and rude antics, McSwain did not deserve to wear the badge of a state employee.

McSwain petitioned for a peremptory writ of mandate, contending the Board's decision was not supported by the evidence. The court denied the petition, finding there was sufficient evidence to warrant dismissal. It accepted the Board's conclusion that dismissal could be appropriate for a one-time serious incident in a sensitive position.

DISCUSSION

I

McSwain's opening brief is a rambling diatribe. He criticizes the fairness of both the investigation and the hearing and reargues the evidence to bolster his position. Based on his view of the evidence, he contends the evidence does not support the Board's findings. He contends the Department failed to conduct a thorough and neutral investigation. Both contentions are based on his assertion that Lawrence and Blood were biased against him and their testimony was not credible. He cites to various aspects of their testimony and argues it is inconsistent with other evidence and should be discredited.

Specifically, McSwain contends there is no evidence that he abandoned his post and failed to respond to the alarms. He notes there was conflicting evidence as to the number and duration of the alarms and contends the only credible testimony was that of the electrician, who testified there were two alarms that sounded for only a few seconds as he began his maintenance. McSwain contends this evidence is credible because it is corroborated by the sequential events recorder that prints out when alarms are sounded. McSwain argues his failure to respond to the alarms is explained by their short duration.

"The Board is a statewide administrative agency which is created by, and derives its adjudicatory power from, the state Constitution. [Citations.] Under that constitutional grant, the Board is empowered to 'review disciplinary actions.' In undertaking that review, the Board acts in an adjudicatory capacity. . . . [T]he Board acts much as a trial court would in an ordinary judicial proceeding. Thus, the Board makes factual findings and exercises discretion on matters within its jurisdiction. On review the decisions of the Board are entitled to judicial deference. The record must be viewed in a light most favorable to the decision of the Board and its factual findings must be upheld if they are supported by substantial evidence. [Citation.] In addition, the Board's exercise of discretion must be upheld unless it abuses that discretion." (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 823.)

Like the trial court, our review is limited to whether the Board exceeded its jurisdiction, committed errors of law, abused its discretion, or made findings that are not supported by the evidence. (*Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 870.) Where the evidence is conflicting, the credibility of witnesses and the proper weight to be given to their testimony are matters within the exclusive province of the Board. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189.) We defer to the Board as to the inferences to be drawn from the evidence, provided the Board's inferences are not arbitrary and have reasonable foundation. (*Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 273.)

The Board properly made credibility determinations as to the conflicting testimony. Several witnesses testified McSwain could not be found when the shift relief arrived. While they were looking for him, an alarm sounded and he did not respond. Lawrence then had Giraldin sound a signal alarm twice; this alarm was not recorded by the sequential event recorder. When McSwain was found in the women's restroom, he appeared groggy, said he had been caught, and mentioned he forgot to set his wrist alarm. This evidence supports the Board's finding that McSwain secreted himself in the restroom and failed to respond to the alarm.

In his reply brief, McSwain challenges the sufficiency of the evidence to support the Board's finding as to his sexual remarks about Blood's wife. An argument raised for the first time in a reply brief is deemed waived unless good cause is

shown for failure to present it before. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.) In any event, defendant's contentions regarding the sexual comments are meritless. He faults the Board's decision for failing to identify the employees to whom he made the remarks. At the hearing Scoles, Allen and Compton testified to the remarks and McSwain denied making them. The Board was free to accept their testimony over his.

McSwain further contends that if he did make reference to his prior sexual relationship with Blood's wife, such comments are protected by the First Amendment to the United States Constitution. The determination whether an employer may discipline a public employee for speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Pickering v. Board of Education* (1968) 391 U.S. 563, 568 [20 L.Ed.2d 811, 817].)

Relying on *Department of Corrections v. State Personnel Bd.* (1997) 59 Cal.App.4th 131, McSwain contends he had a right to express matters of public concern. In *Department of Corrections*, this court found a white correctional officer's outburst that he "was tired of this Hispanic shit" to a female Hispanic officer was a protected comment about affirmative action; discipline could only be based on the manner in which it was delivered, with profane language and by grabbing her by the

collar and shaking her, not on its content. (*Id*. at pp. 146-151.) McSwain contends he was concerned about nepotism, claiming he lost a promotion so Blood's wife could be given a job. His remarks, quoted above in the factual background, cannot be construed as a comment on nepotism; they are vulgar and inappropriate for the workplace. The Board did not err in finding them cause for discipline.

II

McSwain contends the Department could not fire him based on his disability and the Department knew of his disability because he had an anxiety attack that required hospitalization. He contends it was an abuse of discretion to reject the medical evidence that he suffered from medical conditions that caused dizziness; the Department waived any right to discipline him for an episode of dizziness because it failed to seek a medical examination under Government Code section 19253.5; and the Department and the Board failed to consider his rights under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.).

As with many of McSwain's contentions, this one is premised on his version of events, not the factual findings of the Board. While McSwain testified he sought out the couch in the women's restroom because he was dizzy, the Board rejected a medical excuse for the restroom incident. The Board found -- and the evidence supports -- that McSwain did not report his dizziness when found, but instead said he was caught and that he forgot to set his alarm. Further, the Board found that even if McSwain was not feeling well, he had the responsibility to notify

someone about his condition. There was a telephone in the lobby where he claimed to first become dizzy. McSwain testified he did not think it was necessary to notify Allen. The Board found this position "difficult to believe."

Further, it was undisputed that at no time before he was dismissed did McSwain request any reasonable accommodation for his medical condition. The record simply does not support McSwain's contention that he was dismissed because of a disability.

III

McSwain contends the penalty of dismissal was excessive. He argues others were only reprimanded for abandoning their positions, there were no complaints about his lewd behavior, and he did not receive any progressive discipline.

"Generally speaking, '[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion.' [Citations.]" (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]" (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) "The fact that reasonable minds may differ as to the propriety of the penalty imposed will fortify the conclusion that the administrative body acted within the area of its discretion. [Citation.]" (*Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541, 553.)

When reviewing disciplinary actions, the Board is charged with rendering a decision that is "just and proper" under the circumstances. (Gov. Code, § 19582, subd. (a).) The overriding consideration in public employee discipline cases "is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.]" (*Skelly v. State Personnel Bd., supra*, 15 Cal.3d 194, 218.) The circumstances surrounding the misconduct and the likelihood of its recurrence are also relevant factors. (*Ibid*.)

The Board concluded that dismissal was appropriate for McSwain's intentional misconduct in secreting himself in the women's restroom, coupled with his other acts of misconduct. The Board was concerned that if the alarms had been an actual emergency rather than maintenance, McSwain's failure to respond could have resulted in serious damage. The Board thus properly focused on the potential harm to the public service posed by McSwain's misconduct.

McSwain's contentions that others were only reprimanded for similar misconduct and that he did not receive progressive discipline do not show an abuse of discretion in the penalty selected by the Board. The record does not demonstrate that Scoles's acts of leaving the plant were comparable to McSwain's misconduct. Even if it did, a public agency is not required to impose identical penalties for the charges similar in nature. (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230.) Finally, the decision whether progressive discipline was appropriate is within the agency's discretion. (*Kazensky v.*

City of Merced (1998) 65 Cal.App.4th 44, 76; *Talmo v. Civil Service Com., supra,* at p. 230.) Progressive discipline is not required in cases of serious willful misconduct. (***Rita T. Nelson*** (1992) SPB Dec. 92-07 <http://www.spb.ca.gov>)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

SCOTLAND, P.J.

CALLAHAN, J.